IN THE COURT OF APPEAL OF NEW ZEALAND 24/4 C.A. 439/91

THE QUEEN

4 95

v.

ROBERT CHRISTOPHER MEURANT

Coram: Casey J (presiding)
Holland J
Henry J

Hearing: 9 April 1992

Counsel: P J Morgan for Crown
H Lawry and Miss Emma Aitken for Appellant

Judgment: 9 April 1992

JUDGMENT OF THE COURT DELIVERED BY CASEY J

Robert Christopher Meurant faced counts of sexual violation by rape, sexual violation by unlawful sexual connection and indecent assault all of them alleged to have been committed on a 7-year old girl on 4 February 1991. He pleaded guilty to indecent assault and after a trial in the High Court he was acquitted of rape, but found guilty on the second count involving digital penetration of the girl's vagina. He was sentenced to concurrent terms of 2 years 11 months (allowing for one month's remand custody) on the latter charge and 9 months for the indecent assault. He appeals against his conviction and sentence on the sexual violation count.

At the time he was 43. The Crown case was that while staying at her home with the family he was cuddling the girl while they watched television in an upstairs lounge by themselves. Over a period of 15-20 minutes this developed into embracing each other and then he touched her genital area through her clothes. This formed the subject of the indecent assault charge to which he pleaded guilty.

On the more serious count of sexual violation the girl gave evidence by means of a video-taped interview that after the episode in the lounge they went swimming together in a pool annexed to the house. She said he told her he wanted to get inside her body. He had taken off his own and her togs and she was sitting on his knee and she said his penis felt hard and it went up her vagina and hurt a little bit. She demonstrated with anatomical dolls. In cross-examination she agreed that she called the part of her body between her thighs her vagina, including the fold of flesh. The following exchange took place later in cross examination :

> "Rob will say that in the swimming pool he touched you between your legs with his hand but not his penis; would you have any comment to make about that? both
>
> But you couldn't see what was in the water through could you? no not exactly
>
> So would it be fair to say that you think it was his penis but it might have been his finger? It felt more like his penis
>
> But you can't be sure? No, not exactly
>
> But you are aware of something that was hard touching you between your legs? Yes
>
> And was that touching you around that fold in the flesh that we talked about before? Yes
>
> In fact so far as touching is concerned in the swimming pool, that's all that happened isn't it? Yes."

On that concession the finding of not guilty on the rape count is understandable.

In a statement to the police the appellant admitted the indecent assault in the lounge explaining that he thought the girl liked what he was doing and encouraged him. He described how they were subsequently playing around in the pool and eventually they were sitting cuddling each other and he started fondling her genital area through her togs, in what he thought was a natural way. He accepted he might have said he wanted to get inside her body. Then he said he moved her togs between her legs sufficiently to enable him to insert his finger in her vagina which he did gently and she seemed to enjoy it. They stayed like that for a few minutes. He said he used the middle finger of his right hand and that he "didn't move it around all that much". He regarded the episode as experimental and novel behaviour within the context of the girl's developing sexuality. He denied putting his penis inside her.

The first ground of appeal was that his statement to the police should not have been admitted because of failure to comply with s23 of the New Zealand Bill of rights Act 1990, in that the appellant, being in effect under arrest, should have been informed of his right to a solicitor. This point was not made at the trial and there were no questions asked of the police witnesses or the accused in relation to it. Without any direct evidential foundation, Mr Lawry prayed in aid the judgment of this court in **R v Crime Appeal (CA 227/91 and 228/91; 25 October 1991)**, but we are satisfied that the facts here do not support the inference that he was under arrest either at the house or at the police station, to which he went quite voluntarily.

The second ground was that there was not sufficient evidence of penetration of the girl's vagina as distinct from her vulval area. Section 128(5) of the Crimes Act defines sexual connection for present purposes as penetration of the vagina.

The appellant gave evidence that when making his statement acknowledging that he inserted his finger into her vagina, he did not appreciate that there was a distinction between the vulval area and the vagina. As a result of his subsequent research and counselling he had gained a much clearer understanding of the terminology. He explained what he did in these terms :

> "Well I put my finger in under the togs and ran it lightly on two bulges that were there and then rested lightly on the groove that ran between them and ah my finger remained like that; it was the top surface of the finger and we just sort of communed with one another for a time and her hands were round my neck and I think my other hand was round behind the small of her back just lightly steadying one another and we just stayed like that for a time."

On that evidence Mr Lawry submitted that the jury could not have been satisfied beyond reasonable doubt that there was penetration of the vagina itself. However, the passage just cited from his evidence hardly accords with the detailed description of his actions recorded in the police statement to which we have referred and there was no challenge to its accuracy.

The evidence from the girl discussed earlier in this judgment also indicates that she felt something went up her vagina - the word 'up' being scarcely consistent with the gentle rubbing of the vulval area which the appellant described; and nor was her comment that "it hurt a little bit". Also of significance to what the appellant did was his reported comment to the girl that he would like to get inside her body.

The jury were entitled to reject the explanation in his evidence of what he did, and we are satisfied that in the light of the matters just discussed, there was

ample evidence for them to find the appellant guilty of digital penetration. Accordingly the conviction appeal must be dismissed.

The sentence of 3 years' imprisonment for that offence is attacked as manifestly excessive, although Mr Lawry conceded that imprisonment was inevitable. The Victim Impact Report indicates that the girl is well loved and supported by her family and is receiving appropriate professional help, and her prognosis for full recovery is excellent. Against the general run of such reports in these cases, this one presents optimism for the future after recovery from the immediate impact on the child and her family.

The sentencing Judge (who also presided at the trial) received testimonials from a number of concerned friends and professional associates of the appellant. He is well regarded both personally and for his academic qualifications and intelligence, but has experienced great problems in finding any employment in keeping with his attainments. It is also apparent from those sources, and from the evidence he gave at the trial, that he has his own view of society and his place in it, leading to the conclusion that at the time of these offences he had very little insight into his conduct and its effects. It is to his credit that when confronted by the girl's parents, and later by the police, he took steps to seek support and counselling from appropriate groups and agencies. He also expressed remorse to the Court and through the pre-sentence report and in the references we have referred to.

Mr Lawry cited a number of decisions dealing with sentences for sexual offending, but most of them had little relevance to the present circumstances. We need only mention two judgments of this court. In **R v Barnden (CA 130/90; 15 April 1991)** we accepted that offending of this type generally falls somewhere between the culpability of indecent assault and that of full sexual intercourse, and

repeated our earlier-expressed view against seeking to establish any benchmark or tariff for offending which can vary so much in its circumstances. The other case is **R v Johnston (CA 323/90; 9 April 1991)** where the facts are somewhat similar. A 33-year old boarder found guilty after a trial received an effective sentence of 4 years' imprisonment for three episodes of digital penetration of a 7-year old girl's vagina, each lasting several seconds. The sentence was reduced, the Court stating that the circumstances did not require more than 2½ years.

In the present case the Judge referred to a submission that it would be appropriate to pass a sentence which would enable conditions of parole to be imposed, i.e. one not exceeding two years. Parole for offending of this nature is excluded for longer terms - see s93(2A) of the Criminal Justice Act. This was in support of a plea that the appellant should receive counselling under supervision. The Judge expressed the view that because of his extreme intelligence he should be quite capable of understanding the seriousness of his conduct and its consequences, and should have the ability to control himself. Unfortunately, as this case amply demonstrates, intelligence is not a guarantee of such results.

The appellant's attitude to the girl and her parents and at the trial shows just how easily intelligence can give rise to self-serving rationalisation and justification of conduct known to be condemned by society. And for the same reason we cannot agree with the Judge's comment that he could not see as a necessary part of his rehabilitation that he be directed to obtain counselling. On the contrary, we think there is a real risk that once his prison sentence is served he may well feel that he has discharged his debt to a society whose standards he does not accept, and resume his life in the community with the same attitudes.

In his favour on sentencing he can point to the fact that he has an unblemished record; and to the regard in which he appears to be held by his friends and associates; and to the fact that he exerted no force or coercion on the girl (although the natural trust she would have in a family friend would hardly make it necessary). The episode was of short duration and has had no lasting effects, and he owned up to the indecency immediately, expressing remorse - although this might be somewhat qualified by the attitude he took at the trial. And finally he sought counselling and support at an early date.

We see a need for structured counselling in the light of the appellant's somewhat unusual personality and attitude, and we think that a sentence which would allow for this would be more appropriate than one which will simply leave him to his own devices on release. A lesser sentence would also accord with that recognised as appropriate in **R v Johnston**.

Accordingly we allow the appeal and substitute a sentence of 1 year 11 months, with a direction under s77(A) of the Criminal Justice Act that on his release on parole he be subject to such special conditions as to counselling as the District Prisons Board shall see fit to impose.

Mc Casey J

Solicitors: Crown Solicitor, Rotorua